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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 299

PAUL ROBERT COHEN,

Appellant,

v.

CALIFORNIA,

APPEAL FROM THE COURT OF APPEAL OF
CALIFORNIA SECOND APPELLATE DISTRICT

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

INTRODUCTION

Appellant appeals from a judgment of the Court of Appeal, Second Appellate District, State of California, entered October 22, 1969 (A. 26), affirming a judgment of conviction entered by the Municipal Court of the Los Angeles Judicial District, State of California, on September 27, 1968 (A. 8). Appellant was charged with "engaging in

tumultuous and offensive conduct" in violation of the California disturbing-the-peace statute, section 415 of the California Penal Code (A. 1). The said Municipal Court, sitting without a jury, found Appellant guilty, and sentenced Appellant to thirty days in county jail (A. 8).

Upon appeal to the Appellate Department of the Superior Court the judgment was reversed on January 20, 1969 (A. 10). Thereafter State petitioned for rehearing or certification to the Court of Appeal. The Appellate Department granted rehearing (A. 12), and the matter was orally argued for a second time. On May 23, 1969, the Appellate Department once again reversed the judgment of conviction (A. 13). The State again petitioned for certification to the Court of Appeal. The Appellate Department granted the petition and issued an order certifying the cause to be transferred to the California Court of Appeal (A. 23). The Court of Appeal, Second Appellate District, ordered such transfer (A. 25), heard the case on appeal, and affirmed the judgment of conviction (A. 26). Appellant filed a Petition for Rehearing before the Court of Appeal, and said Petition was denied on November 13, 1969 (A. 36). Appellant then filed a Petition for Hearing before the California Supreme Court, and said Petition was denied on December 17, 1969 (A. 36). It is of some significance to note that the Petition for Hearing was denied by the California Supreme Court by a 4-to-3 vote, with Chief Justice Traynor, and Justices Peters and Tobriner dissenting (A. 36).

OPINIONS BELOW

The trial judge in the Municipal Court did not render a written opinion. The Appellate Department of the Superior Court in reversing the judgment of conviction rendered an unreported Memorandum Opinion and Judgment on January 20, 1969 (A. 10). Upon rehearing, the Appellate Department of the Superior Court on May 23, 1969, in once again reversing the judgment of conviction, rendered

a second unreported Memorandum Opinion and Judgment (A. 13). The Court of Appeal, in affirming the judgment of conviction, rendered an opinion (A. 26), which has been reported in 1 Cal. App. 3d 94, 81 Cal. Rptr. 503 (1969).

JURISDICTIONAL GROUNDS

Appellant was convicted of violation of section 415 of the California Penal Code. After reversal by the Appellate Department of the Superior Court (see Introduction), the conviction was ultimately affirmed by the Court of Appeal, Second Appellate District, State of California, on October 22, 1969. Petition for Rehearing before the Court of Appeal was denied on November 13, 1969 (A. 36). In view of the fact that the California Supreme Court thereafter declined to hear the case by denying Appellant's Petition for Hearing (A. 36), the judgment of the said Court of Appeal constitutes a judgment rendered by the highest court of the State of California in which a decision can be had within the meaning of 28 U.S.C. section 1257. (*American Railway Express Co. v. Levee*, 263 U.S. 19, 68 L. Ed. 140 (1923).) The California Supreme Court denied Appellant's Petition for Hearing on December 17, 1969 (A. 36), and the time for bringing this appeal is measured from the date of such denial. (*American Railway Express Co. v. Levee, supra.*) The validity of section 415 of the California Penal Code was drawn in question on the ground of its being repugnant to the First and Fourteenth Amendments of the United States Constitution, and both the trial court (A. 21) and the Court of Appeal (A. 30) rendered decision in favor of the validity of said section 415. It follows, therefore, that an appeal will lie before this Court pursuant to 28 U.S.C. section 1257(2). Notice of Appeal to this Court was filed in the Court of Appeal, Second Appellate District, State of California, on February 20, 1970. The case was docketed in this Court on March 5, 1970 (see Appendix, cover). Jurisdiction was postponed to the hearing of the case on the merits, and the case was trans-

ferred to the appellate docket and placed on the summary calendar on June 22, 1970 (A. 37).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the First and Fourteenth Amendments, U.S. Const., Amend. I, Amend. XIV, Sec. 1.

The statutory provision involved is that portion of section 415, California Penal Code, relating to "offensive conduct." Section 415 reads in its entirety as follows:

> "*Disturbing the peace; noise; use of public streets of unincorporated town for offensive conduct, horse racing, or shooting; indecent language; punishment*
>
> "Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling, challenging to fight, or fighting, or who, on the public streets of any unincorporated town, or upon the public highways in such unincorporated town, run any horse race, either for a wager or for amusement, or fire any gun or pistol in such unincorporated town, or use any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor, and upon conviction by any Court of competent jurisdiction shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the County Jail for not more than ninety days, or by both fine and imprisonment, or either, at the discretion of the Court." (Enacted 1872. As amended Code Am. 1877-8, c. 299, p. 117, § 1.)

QUESTIONS PRESENTED

1. Can one who publicly exhibits in writing the words "Fuck the Draft" be denied the guarantees of freedom of speech under the First and Fourteenth Amendments on the ground that the exhibition of such writing "had a tendency to incite others to violent behavior or to disturb the peace" (A. 29) where the trial court found that: "No evidence was offered by the People indicating or tending to indicate that Defendant either engaged in or threatened any acts of violence, or was about to engage in any such acts, or that Defendant by his conduct incited anyone else to any acts of violence, or that any persons observing Defendant engaged in or threatened, or were about to engage in acts of violence" (A. 19)?

2. Is it a denial of liberty without due process of law in violation of the Fourteenth Amendment to sentence the Appellant to 30 days in jail on the ground that his exhibition in writing of the words "Fuck the Draft" "had a tendency to incite others to violent behavior or to disturb the peace" (A. 29) in view of the finding of the trial court that there was no evidence "that any persons observing Defendant engaged in or threatened, or were about to engage in acts of violence" (A. 19)?

3. Can the expression of words stating a political opinion be punished, notwithstanding the First and Fourteenth Amendments, on the ground that such expression creates a *tendency* that others will respond with violent behavior, where there is an absence of any evidence of a *likelihood* that such a violent response would in fact occur?

4. Does the so-called "fighting words" exception to First Amendment protection apply where the words expressed are critical of a political institution (*i.e.*, the Selective Service System) and not of any individual persons to whom the expression may be addressed, or to any other individual persons?

a. Can such words be considered to be "likely to provoke the average person to retaliation, and thereby cause a breach of the peace"?

b. Even if violent retaliation by persons viewing the words were likely, does this justify silencing the speaker in the absence of proof that the police are incapable of controlling such violent retaliation?

5. Are the words "Fuck the Draft" obscene in a constitutional sense?

a. Does the dominant theme of these words taken as a whole appeal to a prurient interest in sex?

b. Are these words patently offensive because they affront community standards relating to the description or representation of sexual matters?

c. Are these words utterly without redeeming social value?

d. Can these words be regarded as obscene if the answer to either a, b or c of this Question 5 is "No"?

6. If the words "Fuck the Draft" are not obscene in a constitutional sense, may their expression nevertheless be punished, despite the First and Fourteenth Amendments, on the ground that non-obscene profanity is offensive to others?

7. Can non-obscene speech (and particularly speech expressing a political point of view) ever be abridged simply because others find the expression offensive?

8. Is there a "non-speech element" which justifies abridging Appellant's freedom of speech by reason of the fact that he expressed himself in the corridor of a public building when his physical presence and demeanor in such corridor (as distinguished from the words he expressed) was neither illegal, nor objected to by any authorities?

9. Is a criminal statute which punishes speech as a form of "offensive conduct" without specifying which forms of speech will constitute such "offensive conduct" unconstitu-

tionally overbroad in its chilling effect on freedom of speech?

10. If the answer to Question 9 is "yes," is the statute rendered constitutionally valid by a judicial construction which limits its application to speech where there is a *tendency* that the audience for such speech might so object to the speech as to resort to violence, but under such construction speech may be punished even though there is no likelihood that such violence will in fact occur?

11. Is a statute as described in Questions 9 and 10 unconstitutionally vague?

STATEMENT OF THE CASE

While in the courthouse corridor outside Division 20 of the Los Angeles Municipal Court, Appellant wore a jacket upon which were inscribed the words "Fuck the Draft" (A, 18). Also inscribed on the jacket were the words "Stop War" and two "peace symbols" (A. 19). Women and children were present in said corridor (A. 18). Appellant neither engaged in, threatened, nor incited any acts of violence (A. 19), nor were any other persons in the said corridor engaged in, threatening, or about to engage in acts of violence (A. 19). Appellant at no time caused the emission of any loud or unusual noises (A. 19). Appellant testified that by wearing the jacket as thus inscribed the public was made aware of the depth of feeling against the draft shared by himself and his friends (A. 19-20), and that he had no wish to vex, annoy, or injure others (A. 20).

Appellant was charged with "engaging in tumultuous and offensive conduct" in violation of section 415 of the Penal Code. He was convicted, and sentenced to 30 days in county jail (A. 8).

The constitutional issues here raised were first raised at trial on Appellant's motion to suppress evidence on constitutional grounds (A. 4). They were raised once again after

the evidence was admitted on Appellant's motion for entry of judgment of acquittal under California Penal Code section 1118 (A. 7). In each instance the trial court expressly held that Appellant could be convicted of violation of Penal Code section 415 without abridging his rights under the First and Fourteenth Amendments (A. 20-21), and that section 415 is not invalid on its face in that it is neither unconstitutionally vague (A. 21) nor unconstitutionally overbroad (A. 21). In addition, the trial court held that the words "Fuck the Draft" are "obscene" within the constitutional meaning of that word (A. 20).

The same constitutional issues were briefed and argued at each succeeding proceeding in this case. See generally the Court of Appeal's discussion of Appellant's position (A. 26-35).

SUMMARY OF ARGUMENT

Appellant was clearly engaging in speech, and such speech is entitled to First and Fourteenth Amendment protection because it neither contained nor was it accompanied by any of the elements which this Court has heretofore recognized as justifying abridgment of freedom of speech.

There was no threat of violence such as to justify abridgment of Appellant's speech. The Settled Statement makes clear that there was no likelihood of violence either from Appellant or from anyone viewing his words. The trial court erroneously held that no violence potential need be shown in order to convict for the use of words which constitute "offensive conduct." This in itself requires reversal. But even under the construction adopted by the Court of Appeal it is clear that a mere "tendency" that violence *might* result from some unidentified bystanders is too remote a danger to justify abridgment of speech (Argument I A (1)).

Even if there were a likelihood of violence by those opposing Appellant's speech, this in itself would not justify

vitiating Appellant's First Amendment rights, at least in the absence of a showing that the police were unable to restrain those who would resort to violence (Argument I A (2)).

The so-called "fighting words" doctrine is not here applicable because there was no showing of a likelihood that a breach of the peace would result from Appellant's words, and further because Appellant's words were not "fighting words" in the sense of attacking or criticizing those to whom the words were being addressed (Argument I A (3)).

Appellant's words were not "obscene" in the constitutional sense as this Court has defined obscenity in that the dominant theme of the words "Fuck the Draft" does not appeal to a prurient interest in sex, the words are not patently offensive by reason of affronting contemporary community standards relating to the description or representation of sexual matters, and the words are not utterly without redeeming social value (Argument I B).

There were no time, place or manner "non-speech" elements justifying the denial of First and Fourteenth Amendment protection for Appellant's speech. Appellant had every right to be where he was, his manner was neither loud nor unruly, and the only objection by the authorities was to Appellant's speech itself (Argument I C).

The fact that Appellant's speech may have been offensive to some persons does not justify the abridgment of his speech. The First Amendment is equally applicable to offensive and non-offensive speech (Argument II A).

Fundamental First Amendment theory requires protection for speech such as that employed by Appellant. A free marketplace of ideas, or democratic dialogue, is essential for a self-governing people to be able to make informed decisions (Argument II B (1) (a)).

The democratic dialogue would not function properly if the state could censor the form (*i.e.*, particular words chosen to express an idea) of speech even if there were no censorship of the ideas conveyed. In this case if Appellant

had expressed himself in a more polite manner the self-governing people would not have been apprised of the depth of feeling against the draft shared by Appellant and his friends. More fundamentally, if the state could censor the emotive content of speech, even though it did not censor the intellectual content, the state could thereby to a large extent determine to which members of the public a given speech will appeal, and could thus largely influence whether a particular idea will prevail in the marketplace. For this reason it is clear that speech to be protected by the First and Fourteenth Amendments need not be "polite" (Argument II B (1) (b)).

Profanity has become a vital ingredient in the language of dissent as used by many young people, and by many members of minority groups. If the use of such words were to be legally proscribed, the language of dissent, and hence the democratic dialogue, would be severely inhibited (Argument II B (1) (c)).

Furthermore, society at large now tolerates and even rewards the use of the word "fuck" in the arts and in motion pictures. It would be ludicrous to jail Appellant for the use of a word which appears in seven out of the ten best-selling works of fiction, and which is generally acceptable to a large segment of society (Argument II B (1) (d)).

It may not be argued that those who viewed Appellant's words constituted a "captive audience" since at most they were required to fleetingly glance at such words. If such a casual and fleeting contact by an unwilling audience justifies abridgment of speech, then street-corner speakers, radio and television broadcasters and many others whose statements may be offensive to some listeners could be silenced, and the democratic dialogue would be stultified. In this regard, it adds nothing analytically to refer to the "shock" effect of Appellant's words, since this is but a different label for highly offensive words, and offensiveness *per se* does not vitiate First Amendment rights (Argument II B (1) (e)).

Freedom of speech is also important as an end in itself, in that it serves the function of self-fulfillment. This is true of four-letter words both for literary and psychological reasons (Argument II B (2)).

Finally, freedom of speech serves a safety-value function, as men are less inclined to resort to violence to achieve given ends if they can freely express themselves verbally with respect to such ends. The cathartic effect of four-letter-word speech is confirmed by psychological authorities (Argument II B (3)).

Section 415 of the California Penal Code, as construed by the California courts, is unconstitutionally vague and overbroad. Under the Court of Appeal's construction, if there is a mere possibility that someone might be offended by given words and might therefore resort to violence, such words may constitute "offensive conduct" within the meaning of the statute. This is both overly vague and overbroad in applying an impermissible standard. The construction of section 415 by the California Supreme Court in a subsequent case does not save the statute from vulnerability both on grounds of vagueness and overbreadth (Argument III).

ARGUMENT

I

APPELLANT'S SPEECH IS ENTITLED TO FIRST AMENDMENT PROTECTION FOR THE REASON THAT SUCH SPEECH NEITHER CONTAINED NOR WAS IT ACCOMPANIED BY ANY OF THE ELEMENTS WHICH THIS COURT HAS HERETOFORE RECOGNIZED AS JUSTIFYING THE EXCLUSION OF SPEECH FROM FIRST AMENDMENT PROTECTION.

We begin with the incontrovertible fact that Appellant was engaging in speech. Since his expression was formulated in words, and since he was arrested because of his words (A. 18-20), there is presented in this case, at least *prima facie*, an abridgment of Appellant's freedom of speech in violation of the First and Fourteenth Amend-

ments. Highly respected authority has advanced the view that speech is entitled to First Amendment protection "without any ifs, buts, or whereases." *(Beauharnais v. Illinois,* 343 U.S. 250, 275 (Mr. Justice Black dissenting).) Appellant need not and does not here argue, however, that speech in any and all circumstances is necessarily entitled to First Amendment protection. This Court has through the years formulated a number of grounds for excluding certain speech in certain circumstances from the ambit of the First Amendment. But where, as here, the issue is clearly one of speech, First Amendment protection must be forthcoming unless one of the exclusionary grounds recognized by this Court can be shown to be applicable. For reasons which are demonstrated below, no such exclusionary ground pertains in this case.

A. There Was No Threat of Violence Either by Appellant or by Others Observing Appellant Such As To Justify Abridging Appellant's Speech.

(1) *The Grounds Relied Upon by the Court of Appeal Were Erroneous in That the Settled Statement Clearly Establishes That There Was No Likelihood of Violence, and a Mere "Tendency" That Violence Might Result from Speech Is a Constitutionally Impermissible Standard.*

It should first be observed that although the California Court of Appeal in its opinion below required an element of potential violence as a necessary concomitant of "offensive conduct" under the California disturbing-the-peace statute (Penal Code section 415), this was directly contrary to the construction of the statute adopted by the trial court. The trial court ruled that "offensive conduct" within the meaning of the statute "may consist of written words unaccompanied by any actual or threatened violence" (A. 20). For reasons which are set forth below, the element of potential violence is a constitutional necessity in order to validate a statute which purports to punish speech as a form of

"offensive conduct." At the outset, then, it is clear that Appellant's conviction must be reversed even if the construction gloss placed upon section 415 by the Court of Appeal were such as to render the statute constitutional. As this Court stated in *Ashton v. Kentucky,* 384 U.S. 195, 198, 16 L. Ed. 2d 469, 471, 86 S. Ct. 1407 (1966): ". . . where an accused is tried and convicted under a broad construction of an Act which would make it unconstitutional, the conviction cannot be sustained on appeal by a limiting construction which eliminates the unconstitutional features of the Act, as the trial took place under the unconstitutional construction of the Act."

But even if it were assumed that the construction of section 415 adopted by the California Court of Appeal were the same as that followed by the trial court, the conviction still cannot stand, since such construction is itself squarely in violation of the principles laid down by this Court when it considered similar disturbing-the-peace statutes in *Edwards v. South Carolina,* 372 U.S. 229, 9 L. Ed. 2d 697, 83 S. Ct. 680 (1963), and in *Cox v. Louisiana,* 379 U.S. 536, 13 L. Ed. 2d 471, 85 S. Ct. 453 (1965). In essence, the Court of Appeal in the instant case found that speech alone could constitute disturbing the peace under the California statute provided only that such speech "tends to provoke others to break the peace" (A. 28), or that it "*might* cause others to rise up to commit a violent act" (A. 29, emphasis added). In approving this construction of the California statute, the Court of Appeal ignored its earlier general statement that speech in order to be punished as a disturbance of the peace must be "*likely* to create a disturbance" (A. 28). In order to uphold a conviction in the instant case the Court of Appeal was required to approve the lower standard of a "tendency" rather than a "likelihood" that speech will result in violence by others. This for the reason that the record is entirely devoid of evidence indicating any such likelihood. It is clear, of course, that if there is no evidence in the record to support a conviction, such a conviction constitutes a denial of due process in violation

of the Fourteenth Amendment. *Thompson v. Louisville*, 362 U.S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624 (1960); *Garner v. Louisiana*, 368 U.S. 157, 7 L. Ed. 2d 207, 82 S. Ct. 248 (1961) (disturbing-the-peace statute).

Nothing could be clearer than the teachings of this Court that speech may not be abridged in the absence of a likelihood of resulting violence, simply because the authorities conclude that there is a "tendency" that the speech might stir some members of the audience to violence. In *Edwards v. South Carolina, supra,* convictions under a disturbing-the-peace statute were overturned by this Court upon its finding that: "There was no violence or threat of violence upon [petitioners'] part, or on the part of any member of the crowd watching them." (372 U.S. at p. 236; 9 L. Ed. 2d at p. 702.) This is exactly parallel to the present case, where the trial judge found that "No evidence was offered by the People indicating or tending to indicate that Defendant either engaged in or threatened any acts of violence, or was about to engage in any such acts, or that Defendant by his conduct incited anyone else to any acts of violence, or that any persons observing Defendant engaged in or threatened, or were about to engage in acts of violence" (A. 19). In fact, in *Edwards* the possibility of audience violence was measurably greater because there the views expressed "were sufficiently opposed to the views of the majority of the community to . . . necessitate police protection." (372 U.S. at p. 237, 9 L.Ed. 2d at p. 703.) No such police protection was required in the instance case in order to avoid actual or threatened violence.

In *Cox v. Louisiana, supra,* the trial judge upheld convictions under a breach-of-the-peace statute on the ground that it was "inherently dangerous" for "colored people" to demonstrate in "the predominantly white business district in the City of Baton Rouge" (379 U.S. at p. 550, 13 L. Ed. 2d at p. 481), and the State there argued that conviction was warranted by reason of the "fear of violence . . . based upon the reaction of the group of white citizens looking on

from across the street." (379 U.S. at p. 550, 13 L. Ed. 2d at p. 481.) There was testimony, however, that the police "could have handled the crowd" (379 U.S. at p. 550, 13 L. Ed. 2d at p. 481). This Court, in reversing the convictions, concluded that "the 'compelling answer . . . is that constitutional rights may not be denied simply because of hostility to their assertion or exercise.'" (379 U.S. at p. 551, 13 L. Ed. 2d at p. 482.)

Indeed, if the standard adopted by the Court of Appeal in the present case had been accepted by this Court, Negro demonstrators in the South long ago would have been silenced, for to paraphrase the language of the Court of Appeal in the present case, "It was certainly reasonably foreseeable that [Negro civil rights demonstrators in Southern towns in peacefully expressing their views, by such] conduct *might* cause others to rise up to commit a violent act against the person of the [demonstrators]" (A. 29, emphasis added.) That this is not a constitutionally adequate standard to justify the abridgment of speech is abundantly clear from this Court's rulings. Nor is the standard any more acceptable outside the context of Negro civil rights. Through the years this Court has repeatedly made clear that "neither 'inherent tendency' nor 'reasonable tendency' is enough to justify a restriction of free expression." (*Bridges v. California*, 314 U.S. 252, 273, 86 L. Ed. 192, 208, 62 S. Ct. 190, 198 (1941)). Recently, in the context of a case involving a criminal syndicalism statute, this Court affirmed "the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is *likely* to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L. Ed. 2d 430, 434, 89 S. Ct. 1827 (1969) (emphasis added).

Indeed, in the same context as the instant case, *i.e.* an expression of dissent against the Vietnam War, this Court held that the fact that some unknown person or persons

might decide to use violence to put down a speaker is much too remote a danger to justify punishing the speaker. Thus, in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508-09, 21 L. Ed. 2d 731, 739, 89 S. Ct. 733 (1969), this Court stated:

> "The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands [opposing the Vietnam War]. But, in our system, *undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.* Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But *our Constitution says we must take this risk, Terminiello v. Chicago*, 337 U.S. 1, 69 S. Ct. 894, 93 L. Ed. 1131 (1949); and our history says that it is this sort of hazardous freedom - this kind of openness - that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." (Emphasis added.)

Recognizing the constitutional problems of vagueness and overbreadth, the California Supreme Court, after it denied a hearing in the present case (A. 36), ruled in *In re Bushman*, 1 Cal. 3d 767, 83 Cal. Rptr. 375 (1970), that the same statute as is in issue in the present case, Penal Code section 415, "makes punishable only willful and malicious conduct that is violent and endangers public safety and order or that creates a clear and present danger that others will engage in violence of that nature." (1 Cal. 3d at 773; 83 Cal. Rptr. at 379.) But even in the *Bushman* decision, the California Supreme Court apparently equated the "clear and present danger" standard referred to above with acts "that *tend* to incite others to violence." (1 Cal. 3d at 773,

83 Cal. Rptr. at 378.) (Emphasis added.)[1] In any event, "the crucial question is not the formal interpretation of the statute by the Supreme Court of [California] but the application given it." (*Herndon v. Lowry*, 301 U.S. 242, 260, 81 L. Ed. 1066, 1076, 57 S. Ct. 732 (1937).) This Court has not hesitated to reverse a state conviction in violation of First Amendment rights even where subsequent to such conviction the highest state court has construed the statute in question so as to "pass constitutional muster." (*Shuttlesworth v. Birmingham*, 394 U.S. 147, 155, 22 L. Ed. 2d 162, 169, 89 S. Ct. 935 (1969); see also *Ashton v. Kentucky*, 384 U.S. 195, 16 L. Ed. 2d 469, 86 S. Ct. 1407 (1966). As Mr. Justice Black, joined by Mr. Justice Douglas, said in a concurring opinion in *Gregory v. Chicago*, 394 U.S. 111, 113, 122, 22 L. Ed. 2d 134, 137, 142, 89 S. Ct. 946 (1969): "Whatever the validity of the Illinois Supreme Court's construction, this was simply not the theory on which these petitioners were convicted."

(2) *Even If There Were a Likelihood of Violence by Those Opposing Appellant's Speech, the First Amendment Does Not Vest a Veto Power in a Hostile Audience.*

If a speaker's right to express himself could be constitutionally obliterated because his audience so strongly disagrees with the words he speaks that they are willing to resort to violence, this would in effect limit First Amendment rights to expressions which are not sharply controversial.

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[1] In *Bushman* the California Supreme Court cited the Court of Appeal decision in the present case as standing for the proposition that "offensive conduct" must be "conduct *likely* to incite others to violence" (1 Cal. 3d at 773, 83 Cal. Rptr. at 378) (emphasis added). By reason of the Settled Statement in the present case (A. 19), it is clear that in fact Appellant's conduct was not "likely" to incite others to violence. It is of some interest to note that the *Bushman* opinion for the California Supreme Court was written by Mr. Chief Justice Traynor, who dissented from the same court's denial of a hearing in the present case (A. 36).

It would further encourage hostile audiences to express their hostility through violence as a constitutionally efficacious way of removing the speaker's right to speak. It would mean, for example, that college students could, by threatening or engaging in violence, revoke a speaker's constitutional right to appear and speak on campus. This very issue was presented in *Stacy v. Williams*, 306 F. Supp. 963 (N.D. Miss. 1969), which struck down a proposed regulation providing that "no person shall be permitted to use [state college facilities] whose presence will constitute a clear and present danger of inciting a riot on any campus thereof." The three-judge court in *Stacy* concluded: "One simply cannot be restrained from speaking, and his audience cannot be prevented from hearing him, unless the feared result is likely to be engendered by what the speaker himself says or does. In such circumstances envisioned by this proposed regulation, attendant law enforcement officers must quell the mob, not the speaker." (306 F. Supp. at 977.)

That a hostile audience may not exercise a First Amendment veto power was made clear in *Terminiello v. Chicago*, 337 U.S. 1, 93 L. Ed. 1131, 69 S. Ct. 894 (1949). In that case, the defendant spoke under the auspices of the Christian Veterans of America, while a crowd of one thousand persons gathered outside the building in which the speaker appeared. The crowd was "angry and turbulent" and the defendant in his speech condemned the conduct of the crowd and "vigorously, if not viciously, criticized various political and racial groups." The defendant was convicted under a charge of breach of the peace, which was construed by the trial court to include speech "which stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." This Court reversed the defendant's conviction on the ground that the breach-of-the-peace statute as construed by the trial court constituted a violation of free speech. This Court said:

> ". . . a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition

> of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." (337 U.S. at 4.)

The subsequent decision by this Court in *Feiner v. New York,* 340 U.S. 315, 95 L. Ed. 295, 71 S. Ct. 303 (1951), may be viewed as a departure from the principle that a hostile audience may not revoke a speaker's right to speak. If so, decisions by this Court following *Feiner* clearly spell out a return to the principle of *Terminiello.* In overturning a breach-of-the-peace conviction in *Cox v. Louisiana,* 379 U.S. 536, 13 L. Ed. 2d 471, 85 S. Ct. 453 (1965), this Court concluded that even if "'the opinions which . . . [the defendants] were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection' . . . the 'compelling answer . . . is that constitutional rights may not be denied simply because of hostility to their assertion or exercise.'" (379 U.S. at 551, 13 L. Ed. 2d at 482.) Similarly, the First Amendment rights of speakers were upheld even though hostile audiences did "necessitate police protection" in *Edwards v. South Carolina,* 372 U.S. 229, 237, 9 L. Ed. 2d 697, 704, 83 S. Ct. 680 (1963), and in *Henry v. Rock Hill,* 376 U.S. 776, 778, 12 L. Ed. 2d 79, 81, 84 S. Ct. 1042 (1964). Indeed, in *Gregory v. Chicago,* 394 U.S. 111, 22 L. Ed. 2d 134, 89 S. Ct. 946 (1969), this Court reversed convictions under a Chicago disorderly conduct ordinance (prohibiting "breach of the peace") where the defendants' conduct was peaceful and orderly, even though in that case the police were "unable to restrain the hostile hecklers within decent and orderly bounds." (Concurring opinion by Mr. Justice Black, 394 U.S. 111, 113, 117, 22 L. Ed. 2d 134, 137, 139.) In *Bachellar v. Maryland,* 397 U.S. 564, 25 L. Ed. 2d 570, 90 S. Ct. 1312.

(1970), the defendants had been convicted under a "disturbance of the public peace" statute. The trial judge had refused defendants' requested jury instruction that "if the only threat of public disturbance arising from the actions of these defendants was a threat that arose from the anger of others who were made angry by their disagreement with the defendants' expressed views concerning Viet Nam, or American involvement in Viet Nam, you must acquit these defendants." (397 U.S. at 566, 25 L. Ed. 2d at 573, 90 S. Ct. at 1313.) This Court reversed the convictions on the ground that the jury may have found the defendants guilty "because their anti-Vietnam protest amounted to 'the doing or saying . . . of that which offends, disturbs, incites, or tends to incite a number of people gathered in the same area.'" Conviction on this ground, it was concluded, would violate the Constitution. This Court once again reminded us that "'it is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers,' . . . or simply because bystanders object to peaceful and orderly demonstrations." (397 U.S. at 567, 25 L. Ed. 2d at 574, 90 S. Ct. at 1314.) In sum, a statute is unconstitutional if it "'makes a man a criminal simply because his neighbors have no self-control and cannot refrain from violence.' (Chafee, Free Speech in the United States, 151 (1954))." (*Ashton v. Kentucky*, 384 U.S. 195, 200, 16 L. Ed. 2d 469, 473, 86 S. Ct. 1407 (1966).)

The above decisions, then, make clear that even if, contrary to fact, the record revealed a likelihood of violent acts by persons hostile to Appellant's words, this in itself would not vitiate Appellant's right to freedom of speech under the First Amendment. Particularly is this so where there is no showing of police inability to quell such violence.

(3) *Even if a Violent Response to "Fighting Words" Would Constitutionally Justify Silencing the Speaker, the "Fighting Words" Doctrine Is Not Applicable in the Present Case.*

The Court of Appeal below attempted to invoke the "fighting words" concept mentioned in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766 (1942) (see A. 31). But this does not aid the State's position for several reasons. First, and most basically, the *Chaplinsky* "fighting words" concept related to such words as are "*likely* to cause a fight" (315 U.S. at 573); those that are "*plainly likely* to cause a breach of the peace by the addressee" (315 U.S. at 573) (emphasis added); "epithets *likely* to provoke the average person to retaliation, and thereby cause a breach of the peace" (315 U.S. at 574) (emphasis added). Thus, even under *Chaplinsky* there must be a likelihood or probability that the words will cause an addressee to resort to violence. The mere possibility of violence is not enough, which returns us to the post-*Chaplinsky* cases discussed in Argument I A (1) above. In addition, it is to be noted that "fighting words" as used in *Chaplinsky* are synonymous with "insulting" words (315 U.S. at 572), *i.e.* words of abuse referring to the person addressed. Thus, in *Chaplinsky* it was found that "the appellations 'damned racketeer' and 'damned Fascist' are epithets likely to provoke the average person to retaliation . . . ." (315 U.S. at 574.) *Chaplinsky*, then, was an instance of what this Court had earlier described in *Cantwell v. Connecticut*, 310 U.S. 296, 309, 84 L. Ed. 1213, 1221, 60 S. Ct. 900, 906 (1940), as breach-of-the-peace convictions for statements "likely to provoke violence and disturbance of good order" wherein this Court found that "examination discloses that, in practically all [such convictions], the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks *directed to the person of the hearer*" (emphasis added). Contrast this with the phrase "Fuck the Draft" as used by Appellant.

These words did not criticize, no less verbally attack those who viewed the sign. It is the insitution of the draft, and not persons who viewed the sign, that was being attacked. If the concept of "fighting words" can be so broadly interpreted as to be applied here, then any expression with which an audience strongly disagrees constitutes "fighting words" susceptible of abridgement. Yet, that is precisely contrary to the decisions of this Court cited above, which are post-*Chaplinsky*. Finally, it should be noted that *Chaplinsky* itself has not well stood the test of time. Besides "fighting words" that decision also excluded from First Amendment protection "the lewd and obscene, the profane, the libelous . . . ." (315 U.S. at 572.) Yet is is now clear that "the libelous" to a very large extent is included within the scope of First Amendment protection. (*New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).) But what of "the lewd and obscene" and "the profane"? It may be this factor (rather than the stated reason of possible violence) that *sub silentio* moved the Court of Appeal to affirm the conviction, and that caused the California Supreme Court to deny Appellant's petition for hearing while in *In re Bushman*, 1 Cal. 3d 767, 83 Cal. Rptr. 375 (1970), limiting the impact of Penal Code section 415 with respect to the issue of violence. We leave, then, the element of possible violence (which for reasons previously stated cannot constitutionally justify speech abridgement in the present case) and turn to the constitutional status of profanity, as distinguished from obscenity. As will be seen, too much has occurred since the casual dicta of *Chaplinsky* for the Court below to refer without differentiation to "the lewd and obscene" and the "profane."

B. Appellant's Speech Was Not "Obscene," and Hence Cannot Be Excluded From First Amendment Protection on That Ground.

In *Roth v. United States,* 354 U.S. 476, 77 S. Ct. 1304, L.Ed.2d 1498 (1957), this Court held that "obscene" expressions are outside the scope of First Amendment freedom of speech protection. Therefore, in order to avoid Appellant's claim of First Amendment protection, the trial court held, as a matter of law that the words "Fuck the Draft" are "obscene" within the constitutional meaning of that term (A. 20). In this the trial court was in error, in that its ruling is clearly contrary to this Court's constitutional definition of obscenity. One of the more recent expressions by this Court of that definition may be found in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts,* 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1 (1966) (hereinafter cited as *Memoirs v. Massachusetts).* In that case this Court[2] held that in order for an expression to be held obscene,

> "three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." (*Memoirs v. Massachusetts, supra,* at 418.)

It is clear under the holding in *Memoirs* that unless *all three* elements are found to be applicable to a given expres-

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[2]More precisely, the passage above quoted is from an opinion written by Mr. Justice Brennan, and joined in by Mr. Chief Justice Warren and Mr. Justice Fortas. However, a majority of the members of this Court either accepted the definition of obscenity set forth above, or expressed a view that would entirely eliminate or even more narrowly circumscribe the obscenity exemption from First Amendment protection. See the concurrence by Mr. Justice Black and Mr. Justice Stewart, 383 U.S. 413, 421, and the separate concurring opinion by Mr. Justice Douglas, 383 U.S. 413, 424.

sion it may not be held to be obscene and thus without First Amendment protection. Therefore, Appellant's words "Fuck the Draft" may not be held "obscene" and thus denied First Amendment protection, if any one of the three elements is not applicable in the present case. But for reasons set forth below, it will be seen that in fact *none* of the three elements is applicable to the case at bar.

(1) *The Dominant Theme of Defendant's Expression, Taken as a Whole, Does Not Appeal to a Prurient Interest in Sex.*

It hardly requires scholarly erudition or citation of authority to establish the obvious fact that the phrase "Fuck the Draft" does not arouse sexual thoughts, nor appeal to a prurient interest in sex. It is true that in its origin the word "fuck" did have a sexual connotation, and currently one meaning of the word relates to sexual intercourse. But it is also true that there are other currently accepted meanings of the word which are without sexual content. For example, the *Dictionary of American Slang* (Wentworth & Flexner, editors) (Crowell, 1960) includes the following meanings:

> "To cheat, trick, take advantage of, deceive, or treat someone unfairly . . . . confusing; confused; disorganized. Wide W.W. II use."

But the dictionary definition[3] most in point is that by the *Dictionary of American Slang* for the phrase "fuck it": "An expression of dismay or annoyance." See also *Lara v. State*, 95 S.W. 1083 (1906). It is clear that the phrase "Fuck the Draft" was intended to express (A. 19-20) dismay and annoyance with the Selective Service System, gen-

[3] The Court of Appeal is in error when it states that the word "fuck" does not "appear in any standard dictionary" (A. 33). In addition to the definitions set forth above, see *The American Heritage Dictionary of the English Language* (Amer. Heritage Publishing Co. and Houghton Mifflin Co. 1969) which includes in its definition of "fuck . . . To deal with in an aggressive . . . manner" and "fucking . . . Damned. Used an as intensive . . . ."

erally known as "the draft." "Indeed, the word fuck is the most common expletive in our contemporary language to express violent hostility" (Rollo May, M.D., *Love and Will*, W. W. Norton & Co., 1969, p. 48). No one could possibly have believed that Appellant was suggesting sexual intercourse with the Selective Service System. (Compare this Court's recent recognition in *Greenbelt Cooperative Association v. Bresler*, ___ U.S. ___, 26 L. Ed. 2d 6, 90 S. Ct. 1537 (1970), of the several meanings of the word "blackmail" and its conclusion:

> "It is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense." (26 L. Ed. 2d at 15, 90 S. Ct. at 1542.)

It is clear, then, beyond argument, that the expression used by the Appellant had no sexual connotation whatever, no less did it by its dominant theme appeal to a prurient interest in sex. (See *Keefe v. Geanakos*, 418 F.2d 359, 361 (1st Cir. 1969), in which it was held that an article containing the word "motherfucker" could not be read "in whole or in part, as an incitement to libidinous conduct, or even thoughts.") For this reason alone, under this Court's definition of obscenity, Appellant's expression was not obscene.

(2) *Since Appellant's Expression Does Not Relate to the Description or Representation of Sexual Matters, It Does Not Fall Under the Supreme Court's Patently Offensive Test.*

As indicated above, this Court has held that an expression may not be held obscene unless it is

> "patently offensive because it affronts contemporary community standards *relating to the description or representation of sexual matters.*" (*Memoirs v. Massachusetts, supra,* at 418, emphasis added.)

This Court may wish to take judicial notice of the fact that the mere use of the word "fuck" even when relating to sexual matters is no longer patently offensive as an affront to contemporary community standards, in view of the increasing prevalence of literary works of high quality and critical esteem which use this word in a sexual context. J. Donald Adams, former editor of the *New York Times Book* Review, in *The Magic and Mystery of Words,* Chapter VIII, entitled "Those Four-Letter Words," after explicitly discussing the word "fuck," observes that

> "in books today, in mounting fashion, the sky's the limit. All words, so far as propriety goes, now stand equal in the editor's sight." (Holt, Rinehart and Winston, 1963, pp. 72-73.)

(See the further discussion of this point at Argument II B (1)(d), *infra.*) However, judicial notice of the prevalent acceptance of the word "fuck" is unnecessary since even if the word is "patently offensive," as used by the Appellant it did not relate "to the description or representation of sexual matters" (see subparagraph (1), *supra*). Therefore, the "patently offensive" test formulated by this Court has not been satisfied, so that for this reason alone Appellant's expression may not be classified as "obscene."

(3) *Appellant's Expression Was Not Utterly Without Redeeming Social Value.*

This Court has held that there may not be a finding of obscenity unless the expression is "utterly without redeeming social value." (*Memoirs v. Massachusetts, supra,* at 418.) Thus, even if a work has only a "modicum of social value", as was the finding with respect to the work "Memoirs of a Woman of Pleasure" (better known as "Fanny Hill") in *Memoirs v. Massachusetts, supra,* p. 420, it still must be held not obscene, and "this is so even though the book is found to possess the requisite prurient appeal and to be patently offensive." (*Memoirs v. Massachusetts,* supra, at 419.) If expressions of nonpolitical content, such as "Fanny Hill," are held to have sufficient social value as to prohibit a finding of obscenity, how much clearer it is that expressions of a political point of view, as in the instant case, are not "utterly without redeeming social value."

It must follow, then, on each of the three separate and independent grounds enumerated above, that Appellant's expression was not obscene in the constitutional sense, and therefore the freedom of speech guarantees of the First and Fourteenth Amendments cannot be denied on this ground.

C. There Are No Time, Place, or Manner "Non-Speech" Elements in This Case Which Justify Denying Appellant First Amendment Protection for His Speech.

The Court of Appeal opinion implies that apart from possible violence there may have been a non-speech element justifying speech abridgment in the fact that

> "defendant's conduct consisted of marching through a public building with the premediated intent of attracting the attention of others to the message on his jacket.
>
> "The gravaman (*sic*) of the defendant's offense was his selection of the public corridors of the

> county courthouse as the place to parade. . . ." (A. 33)

This, in the first place, is a misreading of the facts. Appellant did not "select" the courthouse corridors as a place to "parade." Appellant was on his way to the courtroom of Division 20 (A. 18), and it was necessary en route to pass through said corridors. In any event this case cannot be assimilated to those cases which have justified abridgment of speech because the speaker had no right to speak at the particular place or time where the speech occurred. The leading case enunciating this principle is *Adderley v. Florida*, 385 U.S. 39, 47-48, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966), wherein demonstrators were held liable for trespass on the jailhouse grounds. This Court denied the

> "unarticulated premise . . . that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please."

However, the Court in *Adderley* was careful to point out:

> "There is not a shred of evidence in this record that this power was exercised, or that its exercise was sanctioned by the lower courts, because the sheriff objected to *what was being sung or said* by the demonstrators . . . . The record reveals that he objected only to their presence on that part of the jail grounds reserved for jail uses." (385 U.S. at 47, emphasis added.)

This is to be contrasted with the present case where Appellant had every right to be where he was, his manner was neither loud (A. 19) nor unruly (A. 19), and the only objection was to what he said. Abridgement in such circumstances is because of a speech, not a non-speech, element. It is a non-speech element, justifying abridgment, only if it involves a "governmental interest . . . unrelated to the suppression of free expression . . . ." (*United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672) (1968).) The objective here was precisely to suppress Appellant's expression, not his

was precisely to suppress Appellant's expression, not his physical presence.

II

THE FACT THAT POLITICAL SPEECH CONTAINS PROFANITY DOES NOT FOR THAT REASON DEPRIVE SUCH SPEECH OF FIRST AMENDMENT PROTECTION.

It is an unchallengeable fact of contemporary American life that young people are increasingly prone to express themselves, particularly in political discussions, through the use of "four-letter" words that older persons might not choose to employ. The present case is one of many in which the lower courts have responded to this phenomenon in a punitive manner. It is time, and urgently required, that this Court explicitly apply the First Amendment principles which it has so carefully evolved to this new commodity in the marketplace of ideas. A consistent application of First Amendment principles would not, of course, immunize any and all public use of profanity. When such use constitutes an immediate prelude and incitement to violent acts, the expression of profanity itself may be subject to punishment. That is not this case (see Argument I A, *supra*). When profanity is used as a part of an "obscene" work or expression, then, again, its use may be subject to punishment. But that, too, is not this case (see Argument I B, *supra*). Finally, any speech, whether it uses profanity or not, may be subject to abridgment if the time, place, or manner of its expression violate legitimate non-speech interests. Again, that is not this case (see Argument I C, *supra*).

What remains is profanity which is objectionable only because some persons may find its expression offensive. Does this justify subjecting Appellant (and many others like him) to 30 days in jail?

A. The First Amendment is Equally Applicable to Offensive and Nonoffensive Speech.

The fact that some persons find a given expression offensive has never been regarded as justifying the abridgment of freedom of speech. Free speech "may indeed best serve its high purpose when it . . . stirs people to anger. Speech is often provocative and challenging. It may . . . have profound unsettling effects as it presses for acceptance of an idea."

Terminiello v. Chicago, 337 U.S. 1, 4, 69 S. Ct. 894, 93 L. Ed. 1131 (1949).

The freedom of speech "guarantee is not confined to the expression of ideas that are conventional or shared by a majority."

Kingsley International Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684, 689, 3 L. Ed. 2d 1512, 79 S. Ct. 1362 (1959).

> "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." (*Street v. New York*, 394 U.S. 576, 592, 22 L. Ed. 2d 572, 585, 89 S. S.Ct. 1354 (1969).)

Thus, this Court has held that under the First Amendment a motion picture may not be censored on the ground that it is "sacrilegious" (*Burstyn v. Wilson*, 343 U.S. 495, 72 S. Ct. 777, 96 L. Ed. 1098 (1952)), though to many this may be more offensive than profanity. And it hardly requires citation of authority to conclude that simply because the writings of Adolph Hitler or of Joseph Stalin are terribly offensive to many people, this does not justify a legal prohibition of such writings.

For a further exploration of just why the First and Fourteenth Amendment guarantees of free speech extend to profanity, that is, to so-called "four-letter" or "dirty" words,

we turn now to an analysis of the underlying rationale of freedom of speech, and its application to such words.

B. Fundamental First Amendment Theory Requires Protection for Speech Such as that Employed by Appellant.

Mr. Justice Brandeis in his famous concurring opinion in *Whitney v. California*, 274 U.S. 357, 47 S. Ct. 641, 71 L. Ed. 1095 (1927), formulated a now classic statement of the reasons why free speech is protected from governmental interference. These are examined below, together with their application to the present case.

(1) *Free Speech as an Essential Element for a Self-Governing People.*

(a) The Nature of the Democratic Dialogue.

Brandeis in *Whitney* observed:

> "Those who won our independence believed . . . that freedom to think as you will and to speak as you think are indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government . . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law - the argument of force in its worst form." (274 U.S. at 375-76.)

Essentially the same point was made by Alexander Meiklejohn in his famous work *Free Speech and Its Relation to Self-Government* (Harper & Bros., 1948), p. 25:

> "[For a self-governing people] the final aim . . . is the voting of wise decisions. The voters, therefore, must be made as wise as possible. The welfare of the community requires that those who decide issues shall understand them. They must know

> what they are voting about. And this, in turn, requires that, so far as time allows, all facts and interests relevant to the problem shall be fully and fairly presented. . . . Both facts and interests must be given in such a way that all alternative lines of action can be wisely measured in relation to one another. As the self-governing community seeks, by the method of voting, to gain wisdom in action, it can find it only in the minds of its individual citizens. If they fail, it fails. That is why freedom of discussion for those minds may not be abridged."

This Court recently summed up the point here made when it referred to ". . . the purpose of the First Amendment to preserve an uninhibited marketplace of ideas . . . [and to] the First Amendment goal of producing an informed public capable of conducting its own affairs . . ." (*Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390, 392, 23 L. Ed. 2d 371, 389, 390, 89 S. Ct. 1794 (1969).)

(b) The Indivisibility of Form and Substance in the Democratic Dialogue.

Why, it may be asked, should the need for unfettered discussion extend even to the use of "dirty" four-letter words? Why would it not have been sufficient for the Appellant simply to have carried a sign reading: "I Hate the Draft"? Put more generally, the question is: does the First Amendment forbid distinguishing between the offensiveness of the idea conveyed and the offensiveness of the language employed to convey the idea? Clearly, the Constitution requires that a nonoffensive idea offensively expressed receive the same protection as an offensive idea. The form no less than the substance of speech must be granted First Amendment protection if the requirements of a meaningful democratic dialogue are to be preserved.

This is apparent on several different levels. First, and most immediately, if the Appellant had been forced to use the euphemistic "I Hate the Draft" instead of "Fuck the Draft," the self-governing community would in some degree

have been rendered ignorant of "all facts and interests relevant to the problem." The very fact that the Appellant chose to express his feelings about the draft through the use of a word that many would find shocking is an evidence of a depth of feeling (A. 19-20) which itself may be a significant factor as to which the self-governing community should take account. What conclusions the electorate might decide to draw from the evidence of such depth of feeling are beside the point. The conclusion might be that the penalties for draft evasion must be made more severe, or it might be that the draft should be repealed, or it might lead to any one of a number of other conclusions. The point is that unless the electorate is freely exposed to the depth of feeling by young men faced with the draft, any political decisions it makes will be made on the basis of incomplete data.[4] It would be a more pleasant world if some men were not impelled to express themselves in ways that others find offensive, but it would also be a dream world in which the self-governing community would be unable to make decisions based upon hard reality.

But there are also broader implications in the abridgment of freedom of speech that would result if the state were permitted to punish particular choices of language in the expression of ideas, even if it remained possible to express the same ideas in more acceptable language. The emotive content of language can be fully as important as its intellectual content in the competition of ideas for acceptance in the marketplace.[5] If the state has the power to censor

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[4] "Thus the voicing of a minority position is desirable even when stated with much error. 'Those who are unhappy have no need for anything in the world except people capable of giving them their attention.' Freedom increases the chances of attention. Thus it contributes indirectly to truth by hastening a sound decision on a public issue." Zechariah Chafee, Jr., *The Blessings of Liberty* (J. B. Lippincott Co., 1956), pp. 112.

[5] On the distinction between the emotive content and the intellectual (or symbolic) content of language see the classic work of Ogden and Richards, *The Meaning of Meaning* (Routledge & Kegan Paul,

emotive language it is thereby enabled in some meaningful degree to determine which ideas will in fact gain popular acceptance. The fact that the state or members of the public find certain forms of expression to be offensive cannot justify the inhibition of such forms, with the resulting distortion of a truly free competition in ideas. For example, many persons no doubt find most offensive such typical vulgar Marxian cliches as "blood-sucking imperialists," "fascist hyenas," "capitalist lackeys," etc. A state could not, however, consistent with the First and Fourteenth Amendments, forbid the use of such offensive terminology even though it were to permit publication of a scholarly Marxian treatise expounding the same ideas in more acceptable form. Fewer, or at least different, members of the public would tend to be influenced by nonemotive, more intellectualized speech. If the state could determine to which members of the public a given speech might appeal, it could in large measure determine which ideas would prevail in the marketplace. In the exposition of ideas form and substance are inextricably merged, so that neither may be abridged without an impermissible distortion of what is here referred to as the democratic dialogue.

For this reason the First Amendment forbids a state to require that dissenting views be expressed in a manner that the authorities regard as polite.

10th ed. 1949), in which the authors state: "In ordinary everyday speech each phrase has not one but a number of functions. We [discuss here] a twofold division . . . the division between the *symbolic* use of words and the *emotive* use. The symbolic use of words is *statement;* the recording, the support, the organization and the communication of references. The emotive use of words is a more simple matter, it is the use of words to express or excite feelings or attitudes . . . This subtle interweaving of the two functions is the main reason why recognition of their difference is not universal" (pp. 149-50, emphasis supplied by the authors). See also Kenneth Burke, *Semantic and Poetic Meaning*, in The Philosophy of Literary Form (Vintage, 1957), p. 121.

> "[I]t is a prized American privilege to speak one's mind, *although not always with perfect good taste,* on all public institutions." (*Bridges v. California,* 314 U.S. 252, 270, 86 L. Ed. 192, 62 S. Ct. 190 (1941) (emphasis added).)
>
> "As Cooley pointed out long ago (Cooley, Thomas M., *Constitutional Limitations* (7th ed.), p. 613), you cannot limit free speech to polite criticism, because the greater the grievance the more likely men are to get excited about it, and the more urgent the need of hearing what they have to say." (Professor Zechariah Chafee, Jr., *Free Speech in the United States* (Harvard Univ. Press, 1941), p. 43).)

Attorney General John N. Mitchell, in a major policy speech recently affirmed the Justice Department's recognition that free speech extends to the form in which ideas are expressed. He said:

> "Given our times, we cannot expect political demonstrations to be conducted like prayer meetings. *We must expect language which may incite hostility or may be obscene.* This is because the First Amendment protects all of us, including men and women who choose to be unruly, unreasonable and impolite." (*Los Angeles Times,* July 4, 1970, Part I, p. 2, col. 4) (emphasis added).)

(c) Profanity as an Indispensable Ingredient of the Democratic Dialogue.

There is still a further consideration as to why the First Amendment must be held fully applicable to the word "fuck," at least in connection with political expression, as in the present case. As a language relies increasingly on given words, the suppression of such words represents an increasingly serious distortion of the democratic dialogue, and hence of the fundamental principles of free speech. This Court may surely take judicial notice of the fact that "today, many of the young (or would-be young) use . . . obscene language quite deliberately as shock weapons of protest against 'the Establishment.'" (*Time Magazine,* July

11, 1969, p. 61.) (See *Keefe v. Geanakos*, 418 F.2d 359, 361 (1st Cir. 1969), in which the court took judicial notice that the word "motherfucker" is used "by young radicals and protesters from coast to coast.") Four-letter words are, to a large extent, the current language of dissent. "Obscenity, in short, may be viewed as the counter-code to whatever orthodoxy prevails." (Renatus Hartogs, M.D., Ph.D. (with Hans Fantel), *Four-Letter Word Games* (M. Evans & Co., 1967), p. 20.) (Dr. Hartogs is Chief Psychiatrist of Youth House and the New York Detention House for Juvenile Delinquents and Medical Director of Community Guidance Service of New York City. This work is hereinafter cited as "Hartogs.") At a time when the alienation of young people is mounting, and when their loyalty to the democratic "system" is increasingly eroded, it is vital that this Court demonstrate that the right of free speech - including the speech which the young people choose to use - is a part of the "system," and that it is not to be equated with violent acts of dissent, which the "system" cannot and should not tolerate.

Moreover, the use of profanity as an integral part of the language of dissent is particularly observable among the poorer segments of the black community, and among other disadvantaged groups. "To the slum kid, obscenity is not an alien idiom. He is surrounded by it on his street, and even his parents may use four-letter words quite casually" (Hartogs, p. 50). The input of minority groups to the democratic dialogue is obviously vital if "the First Amendment goal of producing an informed public capable of conducting its own affairs" (*Red Lion Broadcasting Co. v. F.C.C., supra,* at 392) is to be realized. Yet, that input is greatly crippled if the very words which many minority group members find essential to the expression of their dissenting views are rendered legally taboo.

It is further to be noted that legal actions against persons for employing four-letter words are generally confined to those who use such words as a part of the language of dis-

sent. Though the use of the word "fuck" by policemen while on duty is notorious (see *e.g.* The Report of the National Commission on the Causes and Prevention of Violence, popularly known as "The Walker Report"), this generally is not complained of by those who take offense at the use of the word by those in dissent, and virtually never leads to prosecution or disciplining of the police. Though not speaking specifically of four-letter words, the following remarks of John Stuart Mill in his classic "On Liberty" are apposite:

> "Undoubtedly the manner of asserting an opinion, even though it be a true one, may be very objectionable, and may justly incur severe censure . . . . With regard to what is commonly meant by intemperate discussion, namely, invective, sarcasm, personality, and the like, the denunciation of these weapons would deserve more sympathy if it were ever proposed to interdict them equally to both sides; but it is only desired to restrain the employment of them against the prevailing opinion; against the unprevailing they may not only be used without general disapproval, but will be likely to obtain for him who uses them the praise of honest zeal and righteous indignation. Yet whatever mischief arises from their use, is greatest when they are employed against the comparatively defenseless; and whatever unfair advantage can be derived by any opinion from this mode of asserting it, accrues almost exclusively to received opinions . . . . [It is therefore] imperative that human beings should be free to form opinions, and to express their opinions without reserve . . . ." (J. S. Mill, On Liberty, *The Philosophy of John Stuart Mill*, (Mod. Lib. ed., 1961) pp. 246-48.)

(d) Profanity as a Part of the Language of Contemporary Society.

Finally, there is something ludicrous in sending the Appellant to jail for his use of a word that society tolerates and often rewards when used in the arts, and even in the mass-media. Seven out of the ten best-selling hard-cover works of fiction during the year 1969, including the first four, repeatedly used the word "fuck" (see Exhibit A, appended hereto). This is illustrative of the indisputable fact that numerous highly popular contemporary literary works contain the word. Motion pictures now also use the word. (The extremely popular "M*A*S*H" is but one such example.) And of course, numerous works using the word "fuck" have been judicially upheld (see Exhibit B, appended hereto).

Widespread use of the word "fuck" can, perhaps, be traced to World War II, when most, if not virtually all, of the members of the armed forces either used or heard the word constantly. Even then, polite society embraced the acronym SNAFU, though this was universally understood to stand for "situation normal - all fucked up" (see *Dictionary of American Slang*, Wentworth & Flexner, editors (Crowell, 1960), p. 493). Since that time the word "fuck" has attained an acceptance not only among young people, but also among many other segments of the population. Just as in 1939 Clark Gable's use of the word "damn" in the motion picture "Gone With the Wind" caused an uproar in some segments of society (Hartogs, p. 22), so the word "fuck" today is found offensive by many persons. But the fact remains that "the word 'fuck,' long a commonplace in youthful vocabularies . . ." (U.C.L.A. *Daily Bruin*, November 20, 1968, p. 1), is increasingly accepted by many diverse segments of our society. The demands of a meaningful democratic dialogue are surely frustrated if because one segment of society finds given language to be offensive this constitutes legal grounds for prohibiting other segments of society from using such language when they find it to be the most expressive means of conveying given ideas.

(e) First Amendment and Privacy Rights of Unwilling Participants in the Democratic Dialogue.

Given the situation that a substantial segment of society finds the use of the word "fuck" to be offensive, while another substantial segment of society not only finds it nonoffensive but also a useful and expressive term, the question is posed as to whether the offended segment can prevent the other segment from using the word in any situation where those who may be offended are likely to encounter the word's use.

It should first be noted that reference to the "shock" effect of profanity adds nothing analytically to the problem. This is but another way of stating that use of such language may be highly offensive, and it has already been demonstrated that offensiveness *per se* does not vitiate First Amendment rights (see Argument II A, *supra*). Many who are not in the least shocked by reading the best-selling works of fiction enumerated in Exhibit A might be terribly shocked (that is to say, highly offended) if they were to read or hear antisemitic statements such as "Zionism is Treason" and "Communism is Jewish." Yet such statements, even if by persons in a picket line in front of a meeting celebrating the independence of Israel, are clearly protected speech. See *People v. Huss*, 241 Cal. App. 2d 361, 51 Cal. Rptr. 56 (1966). (Note that the very Division of the California Court of Appeal that rendered the opinion below in the present case also decided the *Huss* case.)

But, may it be argued that inability of members of the public to avoid being exposed to material which they regard as shocking or offensive (for whatever reason) justifies abridgment of speech of those who would punish such material? This Court has in the past suggested some such limitation in certain circumstances when it spoke of "an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." (*Redrup v. New York*, 386 U.S. 767, 769, 18 L. Ed. 2d 515, 517, 87 S. Ct. 1414

(1967) (dictum).) While it is not at all clear that this Court would recognize any such "captive audience" doctrine (see *Public Utilities Commission v. Pollak*, 343 U.S. 451, 96 L. Ed. 1068, 72 S. Ct. 813 (1952)), if any such limitation upon First Amendment rights were to be accorded recognition, it is vital that it be restricted in such manner that the integrity of the marketplace of ideas, what is here referred to as the democratic dialogue, not be undermined.

The clearest area for permitting the concept of audience privacy (inherent in any "captive audience" doctrine) to prevail over a speaker's First Amendment rights is in the privacy of the home. It is here that the recognition of privacy is most compelling, and the demands of the democratic dialogue least urgent. (Even here, however, a distinction may be drawn between commercial and noncommercial speech. Compare *Martin v. Struthers*, 319 U.S. 141, 87 L. Ed. 1313, 63 S. Ct. 862 (1943), and *Breard v. Alexandria*, 341 U.S. 622, 95 L. Ed. 1233, 71 S. Ct. 920 (1951)). Once outside the confines of the home, to hold, as unsuccessfully argued in *Public Utilities Commission v. Pollak*, *supra*, "that the First Amendment guarantees a freedom to listen only to such points of view as the listener wishes to hear" would carry the gravest dangers for the viability of the democratic dialogue. As Mr. Chief Justice Burger, speaking for this Court, recently recognized: ". . . we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound . . . ." (*Rowan v. United States Post Office Department*, 397 U.S. 728, 738, 25 L. Ed. 2d 736, 744, 90 S. Ct. 1484, 1491 (1970)). This is as it must be if the right of free speech is not to be reduced to a meaningless charade. If persons who do not wish to hear speech which they think they may oppose to to the point of finding it highly offensive were to be insulated by law from any such speech, then freedom of speech would amount to little more than the right to address audiences who already agree with the speaker. In that event commerce in the marketplace of ideas would be frozen, and the democratic dialogue silenced.

The recent case of *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969), is instructive in this regard. Plaintiff, the head of an English department and part-time instructor in the Massachusetts public school system, gave to each member of his senior English class a copy of the September, 1969, issue of *Atlantic Magazine*, which carried an article in which was contained the phrase: "Up against the wall, motherfucker." As a result, plaintiff was subjected to dismissal charges by the school authorities. He unsuccessfully sought from the federal District Court an injunction pendente lite. The Court of Appeals thereafter reversed the order of the District Court, which had denied an interlocutory injunction pending appeal. Here, then, was a "captive audience" of students in a class, and the court posed the question of "whether the shock [of reading the word 'motherfucker'] is too great for high school seniors to stand." The Court responded: "If the answer were that the students must be protected from such exposure we would fear for their future. We do not question the good faith of the defendants in believing that some parents have been offended. With the greatest of respect to such parents, their sensibilities are not the full measure of what is proper education" (418 F.2d at 361-62). In *Keefe* the word in question was, if anything, more shocking than that used by Appellant, and the audience was exclusively children, yet the court found no occasion to invoke a "captive audience" doctrine.

But even if outside the home a "captive audience" rule might sometimes be applied where the audience is truly "captive" in the sense that they have no choice but to listen or view unwanted speech for extended periods, this is certainly not such a case. Appellant was observed in the courthouse corridor (A. 18), and he then entered the courtroom of Division 20 (A. 18). Persons within the courtroom may, in a sense, have constituted a captive audience, but while in the courtroom Appellant removed his jacket and held it folded over his arm (A. 18). Thus persons within the courtroom not only were not required, but were unable, to view the writing on Appellant's jacket. No more than a

momentary glance at such writing was required of persons who may have observed Appellant in the corridor as he made his way to Division 20. If such a casual and fleeting reception of unwanted speech were enough to trigger a "captive audience" doctrine such as to vitiate First Amendment rights, then little remains of the marketplace of ideas and the democratic dialogue. As one makes his way through a public park where speakers in Hyde Park style market their diverse ideas, it is inevitable that one will hear fragments of speech espousing doctrine that many will find terribly offensive. But no one is required to pause and listen to an entire speech. Surely a casual and fleeting exposure to a few offensive lines does not render the hearer a member of a "captive audience." Even in the privacy of one's home the radio or television may carry a speaker whose doctrine is regarded as very offensive to some. The fact that a minimal effort is required to immediately "switch off" the unwelcome speaker surely does not render the radio and television audience "captives." In sum, if fleeting exposure to unwelcome speech deprives Appellant of his First Amendment rights, then the same principle would be applicable to street-corner speakers, and even to radio and television programs, and the central core would be cut out of a First Amendment doctrine. (See *Cantwell v. Connecticut*, 310 U.S. 296, 309, 84 L. Ed. 1213, 1220, 60 S. Ct. 900 (1940), wherein defendant's right to speak upon a public street was upheld, although his speech against organized religion and particularly against the Roman Catholic Church "highly offended" persons who heard him.)

(2) *Free Speech as a Function of Self-Fulfillment.*

Besides discussing speech as a function of democracy, Brandeis in *Whitney* also observed:

> "Those who won our independence believed that the final end of the state was to make men free to develop their faculties . . . . They valued liberty both as an end and as a means. They believed lib-

> erty to be the secret of happiness and courage to be the secret of liberty." (274 U.S. at 375).

That is, free speech is important not only as a means in the democratic process but also as an end in itself. The nature of man is such that he can realize self-fulfillment only if he is free to express himself. Again one may ask but why is it necessary to find such self-fulfillment through the use of "dirty" words that offend others. For most of us there is no felt need frequently to resort to such words. But probably very few persons never feel called upon to occasionally express themselves through the use of words that are not acceptable in polite society.

> "Among males, it is, I believe, the rarest exception who does not use the word [fuck] occasionally." (Leo Stone, M.D., *On the Principal Obscene Word of the English Language*, 35 International Journal of Psycho-Analysis, 30, 50 (1954).)

As J. Donald Adams, former editor of the *New York Times Book Review* observed in *The Magic and Mystery of Words* (Holt, Rinehart and Winston, 1963), p. 68:

> "There are things to be said in favor of even the coarsest of the four-letter words. They are forthright and vigorous, and for that reason preferable to the more ponderous and . . . polite usage . . . ."

The self-fulfilling function of four-letter words finds validation on the psychological as well as the literary level. The well-known psychiatrist, Dr. Renatus Hartogs, has said that the use of such words "provides a socially acceptable projection surface for repressed motives and instinctual needs" (Hartogs, p. 14). Another authority in the field of psychiatry has observed that the use of such words can result in "a mitigation of guilt feeling" (Edmund Bergler, *Obscene Words*, 5 Psychoanalytic Quarterly 226, 246 (1936)). Indeed, among some psychiatrists and psychologists it is thought to be "therapeutic" to use four-letter words in sessions of psycho-analysis (see Rollo May, *Love and Will* (W. W. Norton & Co., 1969), p. 47).

In some persons the need for the self-fulfillment that is achieved through the use of four-letter words is greater than in others. Many members of the younger generation appear to regard the use of such language as a necessary means of expressing certain values which are of great importance to them. Alexander Sesonske, Professor of Philosophy at the University of California, Santa Barbara, in speaking of the Berkeley Filthy Speech Movement, states:

> "They claimed the right to *be* frank, open, uninhibited non-conformists, avant garde, honest and free from hypocrisy - the sort of persons who use four-letter words freely in public. That such speech habits might also (or perhaps instead) be constitutive of persons who are licentious, inconsiderate, disrespectful and ill-bred apparently did not bother the Filthy Speech group." (Sesonske, *Saying, Being and Freedom of Speech,* 1 Philosophy and Rhetoric 25, 35 (1968).)

Most of us would not find self-fulfillment in such extreme use of four-letter words, but it cannot be denied that it serves this function for a considerable number of persons.

(3) *Freedom of Speech as a Safety Valve.*

> Finally Brandeis in *Whitney* observed that "order cannot be secured through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones." (274 U.S. at 375.)

Thus a third separate function of free speech is as a safety valve. Men will be less inclined to resort to violence to achieve given ends if they are free to express themselves in such words as they may choose in advocating such ends.

Brandeis's insight as to the cathartic effect of speech has been confirmed by psychological studies. See Seymour Feshbach, *The Function of Aggression and the Regulation of Aggressive Drive*, 71 Psychological Review 257 (1964); John W. Thibaut and John Coules, *The Role of Communication in the Reduction of Interpersonal Hostility*, 47 Journal of Abnormal and Social Psychology 770 (1952). Indeed, one authority has speculated on the possibility that "legal authorities might be advised to provoke expressions of overt hostility in potentially dangerous mobs in situations in which this hostility can be controlled safely in order to prevent later outbursts when the controlling situations are inadequate." (Leonard Berkowitz, *Some Factors Affecting the Reduction of Overt Hostility*, 60 Journal of Abnormal and Social Psychology 14 (1960).) In any event, it seems clear that at least in some instances the use of four-letter words "releases repressed urges that might otherwise become extremely dangerous and destructive" (Hartogs, p. 78).

Society can far better bear the occasional annoyance of a sign such as that exhibited by Appellant than it can the alternative acts of violence (such as the bombing of draft boards and other institutions, and attacks on the Pentagon) as a way of expressing opposition to the draft. To the extent that we abridge the right of completely free verbal dissent for everyone we increase the likelihood that such dissent will be channeled into other, more dangerous, forms.

III

SECTION 415, AS CONSTRUED BY THE CALIFORNIA COURTS, IS UNCONSTITUTIONALLY OVERBROAD AND VAGUE.

Even if the use of the words "Fuck the Draft" could be punished under a properly drawn statute, Appellant's conviction must nevertheless be reversed because the statute under which he was convicted is invalid as it is both unconstitutionally vague and overbroad.

To Appellant's argument in this regard, the Court of Appeal responded by purporting to narrow the statute in such manner that speech may constitute "offensive conduct" only if it "incites violence or has a tendency to incite others to violence or a breach of the peace" (A. 31). This, it is said,

> "makes clear for triers of fact the nature of the forbidden conduct, and eliminates prosecutions or convictions for conduct which is merely offensive." (A. 31.)

We have already discussed in Argument I A (1) why this standard is constitutionally impermissible. Under the Court of Appeal's construction of section 415, not only profanity but any words may be punished if there is a mere possibility that others might object to the words to the extent of making a violent response. This constitutionally impermissible standard is not limited to profanity. Who is to say which words others *might* find so objectionable as to respond violently? A criminal statute must be written so as to give clear warning as to what conduct is proscribed. This doctrine was recently invoked in *In re Davis*, 242 Cal. App. 2d 645, 51 Cal. Rptr. 702 (1966), wherein that portion of California Penal Code section 650½ making it a crime "to commit any act which openly outrages public decency" was held unconstitutional on the ground of its vagueness. The Court there stated (at 664-65):

> "We have a statute which may truly mean all things to all men, for if it be said that public decency should not be defined by the standards of the most profligate segment of the community, neither could we accept the definitions of the most prudish. We have a statute which gives the executive almost unlimited power to harass those with whose conduct or morals it is at odds or whom it suspects of having committed other crimes which cannot be proven."

If words alone, unrelated to actual or threatened violence, may constitute "offensive conduct" within the meaning of

section 415, then manifestly here too we have a statute "which may truly mean all things to all men." Here is vagueness in its most rampant form. Indeed, the California court long ago recognized the validity of this point in connection with a San Francisco breach-of-the-peace ordinance which punished the use of "any words . . . having a tendency to create a breach of the peace." In *Ex parte Kearny*, 55 Cal. 212, 222 (1880), referring to this ordinance, that court held that the complaint charged no offense, and stated:

> "We shall not inquire, in this place, how it accords with constitutional law . . . . to place the power in the hands of a judge or jury to decide that 'any words' - to others, perhaps, apparently innocent - which they may think objectionable, have a tendency to create a breach of the peace. *That the language charged in the particular instance now before us was not only indecorous, but in the highest degree indecent, cannot affect the question.* The next conviction may be for the use of words less offensive, and the attempted definition of the crime sought to be created by the ordinance is so uncertain, as would leave it to the varied judgments or tastes of successive juries to find defendants guilty or not guilty of a crime for the use of exactly the same language." (Emphasis added.)

Related to, but distinguishable from, the defect of vagueness is that of overbreadth. Even if a statute which limited punishment to the public use of profanity would be constitutionally proper, such punishment may not be invoked under a statute which purports to punish any words which others might find offensive. This involves the defect of overbreadth wherein a single statute encompasses both valid and invalid restrictions on free speech. This Court has repeatedly held that a conviction may not stand under an overbroad statute even if the particular conduct in issue could have been properly punished under a narrowly drawn statute.

> "Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression - of transcendent value to all society, and not merely to those exercising their rights - might be the loser. [Citation.] For example, we have consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute with the requisite narrow specificity." (*Dombrowski v. Pfister*, 380 U.S. 479, 486, 14 L. Ed. 2d 22, 28 (1965).) (See also *N.A.A.C.P. v. Button*, 371 U.S. 415, 432-33, 9 L. Ed. 2d 405, 418 (1963).)

What this Court said with respect to the breach-of-the-peace statute in *Cox v. Louisiana, supra,* is equally applicable here: ". . . the conviction under this statute is unconstitutional in that it sweeps within its broad scope activities that are constitutionally protected free speech and assembly" (379 U.S. at 552, 13 L. Ed. 2d at 482-83).

Nor does the construction of section 415 placed upon it by the California Supreme Court in *In re Bushman*, 1 Cal. 3d 767, 83 Cal. Rptr. 375 (1970), save it from the defects of overbreadth and vagueness. In the first place, the opinion in *Bushman* is ambiguous on whether the standard is that the words "tend to incite others to violence" (1 Cal. 3d at 773; 83 Cal. Rptr at 378) or that they create "a clear and present danger that others will engage in violence . . . ." (1 Cal. 3d at 773; 83 Cal. Rptr. at 379). If the former standard is applicable then the statute is clearly overbroad for reasons advanced in Argument I A (1) *supra*. Even if the "clear and present danger" standard is applied, the statute is still impermissibly overbroad in that it would permit silencing a speaker simply because his audience opposes his speech to the point of willingness to engage in violent conduct in order to stop the speaker. The reasons why this is constitutionally impermissible are set forth at Argument I

A (2), *supra*. Finally, the fact that the California Supreme Court denied a hearing in the present case (A. 36) suggests that it would not apply the construction of *Bushman* to the language of profanity or so-called "shock" words. This in itself renders the statute unconstitutionally vague, since who is to say what words fall into this category? Are such words as "damn" and "screw" to be included in the class of proscribed words? If all words that anyone may regard as constituting profanity may be denied First Amendment protection, then the category is surely defective as over-broad. If something less than such a broad category is intended, then the statute is defective for vagueness.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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EXHIBIT A

The following works constituted, in the order indicated, the ten best-selling hard-cover works of fiction for the year 1969, as reported by *Publisher's Weekly*, February 9, 1970, p. 40.

Title	Pages on Which the Word "Fuck" Appears*
1. PORTNOY'S COMPLAINT by Philip Roth	85, 102, 106, 112, 117, 121, 124, 125, 129, 131, 134, 138, 140, 141, 142, 153, 159, 160, 161, 175, 177, 182, 195, 196, 197, 198, 211, 212, 224, 231, 233, 235, 265, 267, 270 (Random House edition)
2. THE GODFATHER by Mario Puzo	68, 134, 265 (Fawcett edition)
3. THE LOVE MACHINE by Jacqueline Susann	33, 144, 179 (Bantam edition)
4. THE INHERITORS by Harold Robbins	5, 9, 14 (Trident Press edition)
5. THE ANDROMEDA STRAIN by Michael Crichton	----
6. THE SEVEN MINUTES by Irving Wallace	125, 127, 129 (Simon & Schuster edition)
7. NAKED CAME THE STRANGER by Penelope Ashe	31, 37, 64 (Dell edition)
8. THE PROMISE by Chaim Potok	----

*Except in the case of PORTNOY'S COMPLAINT, page citations are merely illustrative and not exhaustive.

9.	THE PRETENDERS by Gwen Davis	13, 72, 104 (Signet edition)
10.	THE HOUSE ON THE STRAND by Daphne du Maurier	----

The number one best-selling nonfiction work for 1969, as reported by *Publisher's Weekly, supra*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, also contains the word "fuck." See Argument I B (1), *supra*.

EXHIBIT B

The following works, each of which contains the word "fuck," have been judicially upheld:

TROPIC OF CANCER by Henry Miller:

Grove Press, Inc. v. Gerstein, 378 U.S. 577, 12 L. Ed. 2d 1035, 84 S. Ct. 1909 (1964)

Zeitlin v. Arnebergh, 59 Cal. 2d 901, 31 Cal. Rptr. 800 (1963)

Attorney General v. A. Book Named "Tropic of Cancer," 345 Mass. 11, 184 N.E. 2d 328 (1962)

McCauley v. Tropic of Cancer, 20 Wisc. 2d 134, 121 N.W. 2d 545 (1963)

LADY CHATTERLEY'S LOVER by D. H. Lawrence:

Grove Press v. Christenberry, 276 F.2d 433 (2d Cir. 1960)

ULYSSES by James Joyce:

United States v. One Book Entitled Ulysses, 5 F. Supp. 182 (S.D. N.Y. 1933), aff'd 72 F.2d 705 (2d Cir. 1934)

NAKED LUNCH by William Burroughs:

Attorney General v. A. Book Named "Naked Lunch," 351 Mass. 298, 218 N.E. 2d 571 (1966)

THE CARPETBAGGERS by Harold Robbins:

People v. Pocket Books, Inc., 38 Misc. 2d 1004, 239 N.Y.S. 2d 631 (1963) (indictment insufficient)

CANDY by Terry Southern and Mason Hoffenberg:

Commonwealth v. Dell Pub., Inc., 427 Pa. 189, 233 A. 2d 840 (1967)